(2)

Supreme Court, U.S.
FILED
APR 12 1996
CLERK

No. 95-1496

In The

Supreme Court of the United States

October Term, 1995

ALASKA FEDERATION OF NATIVES,

Cross-Petitioner,

v.

UNITED STATES OF AMERICA, et al.,

Cross-Respondents.

On Cross-Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION TO CROSS-PETITION FOR WRIT OF CERTIORARI

BRUCE BOTELHO
Attorney General
State of Alaska
JOANNE GRACE
**Counsel of Record*
1031 W. 4th Avenue
Suite 200
Anchorage, Alaska 99501
(907) 269-5100

Counsel for Cross-Respondent State of Alaska

April 12, 1996

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

19 pp

QUESTION PRESENTED

Whether in defining "public lands" in the Alaska National Interest Lands Conservation Act Congress understood the navigational servitude to be property to which the United States holds title, thereby demonstrating a clear intent to include all navigable waters in Alaska in that definition and to assume traditional state management of fisheries in all navigable waters in Alaska, a contention rejected by both the Court of Appeals for the Ninth Circuit and the Alaska Supreme Court?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

REASONS FOR DENYING THE WRIT 1

I. AFN ITSELF HAS CHARACTERIZED THE DECISION BELOW AS A SINGULAR ISSUE OF STATUTORY INTERPRETATION APPLICABLE ONLY TO ALASKA 1

II. CONGRESS GAVE NO CLEAR INDICATION THAT IT INTENDED TO USURP TRADITIONAL STATE MANAGEMENT AUTHORITY IN ALL NAVIGABLE WATERS IN ALASKA... 2

III. THE NAVIGATIONAL SERVITUDE IS THE PARAMOUNT AUTHORITY OF THE UNITED STATES OVER NAVIGATION AND DOES NOT CONSTITUTE A PROPERTY INTEREST 5

A. THE AUTHORITY OF THE UNITED STATES TO REGULATE LAND USES DOES NOT GIVE IT TITLE TO AN INTEREST IN THE AFFECTED PROPERTY..... 7

B. THE NINTH CIRCUIT'S REJECTION OF THE ARGUMENT THAT THE UNITED STATES HOLDS TITLE TO THE NAVIGATIONAL SERVITUDE IS CONSISTENT WITH THIS COURT'S PRECEDENT..... 11

CONCLUSION 14

TABLE OF AUTHORITIES

Page

CASES

Amoco Production Co. v. Village of Gambell, 480 U.S. 531 (1987) 6, 11, 12, 13

BFP v. Resolution Trust Corporation, ___ U.S. ___, 114 S. Ct. 1757 (1994) 3

Bobby v. Alaska, 718 F.Supp. 764 (D. Alaska 1989) 4

California Housing Securities, Inc. v. United States, 959 F.2d 955 (Fed. Cir.), *cert. denied*, 506 U.S. 916 (1992) 9

Carey v. South Dakota, 250 U.S. 118 (1919) 3

Ciampitti v. United States, 22 Cl.Ct. 310 (1991) 8

English v. General Electric Co., 496 U.S. 72 (1990) 3

Jones v. Rath Packing Co., 430 U.S. 519 (1977) 3

Kaiser Aetna v. United States, 444 U.S. 164 (1979) 6

Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992) 7

M & J Coal Company v. United States, 47 F.3d 1148 (Fed. Cir.), *cert. denied*, 116 S.Ct. 53 (1995) 8

McDowell v. State, 785 P.2d 1 (Alaska 1989) 5

Metropolitan Life Insurance Co. v. Massachusetts, 471 U.S. 724 (1985) 3

State v. Babbitt, 72 F.3d 698 (9th Cir. 1995) 5

Totemoff v. State, 905 P.2d 954 (1995) 1

United States v. California, 332 U.S. 19 (1947) 11

United States v. Maine, 420 U.S. 515 (1975) 12

TABLE OF AUTHORITIES – Continued

Page

United States v. Twin City Power Co., 350 U.S. 222 (1956) 6

767 Third Avenue Associates v. United States, 48 F.3d 1575 (Fed. Cir. 1995) 9

STATUTES AND LEGISLATIVE REPORTS

33 U.S.C. § 1344(c) (1986) 9

43 U.S.C. §§ 1301-1315 (1986) 10

43 U.S.C. § 1314 (1986) 10

43 U.S.C. §§ 1331-1356 (1986) 12

H.Rep. 96-97, Part II, Committee on Merchant Marine and Fisheries, 96th Cong., 1st Sess. (1979) 4

S. Rep. 1300, Committee on Energy and Natural Resources, 95th Cong., 2d Sess. (1978) 4

OTHER AUTHORITIES

Laurence H. Tribe, *American Constitutional Law* (2d ed. 1988) 3

Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527 (1947) 3

REASONS FOR DENYING THE WRIT

I. AFN ITSELF HAS CHARACTERIZED THE DECISION BELOW AS A SINGULAR ISSUE OF STATUTORY INTERPRETATION APPLICABLE ONLY TO ALASKA.

Cross-Petitioner the Alaska Federation of Natives ("AFN") urges the Court to grant its petition for certiorari because the definition of "public lands" is an issue of "critical importance" to the survival of Alaska Native Villages. Cross-Pet. 3. On the same point in a different brief, AFN argued that the Court should deny the State's petition for certiorari because the definition of "public lands" is an issue merely of statutory interpretation "involving one section of [ANILCA], a statute unique to Alaska with no application to any other state." Private Respondents' Br. in Opp. 1. It stated also that the Ninth Circuit's decision presents no issue warranting review even with respect to its impact within Alaska. *Id.* at 14-5.

Obviously, AFN cannot credibly argue that the issue is both crucial and unworthy of review. If the Ninth Circuit decision involves a simple issue of statutory interpretation of little significance, it cannot also be "of critical importance." There is an essential distinction between the issues the two petitions present that warrants acceptance of the State's petition and denial of AFN's petition, however. The Alaska Supreme Court decision in *Totemoff v. State*, 905 P.2d 954 (1995), creates a conflict with the Ninth Circuit as to the issue of waters subject to a federal reserved water right, the issue of which the State seeks review. *Totemoff* agrees with the Ninth Circuit's conclusion that the United States does not hold title to the

navigational servitude, however, the issue of which AFN seeks review. Denial of AFN's cross-petition will simply maintain the status quo, while denial of the State's petition will instate a jurisdictional conflict between the federal and state courts in Alaska that will harm fisheries and confuse the public.[1] *See* State's Pet. 8-13.

II. CONGRESS GAVE NO CLEAR INDICATION THAT IT INTENDED TO USURP TRADITIONAL STATE MANAGEMENT AUTHORITY IN ALL NAVIGABLE WATERS IN ALASKA.

AFN argues that fishing is an important element of a subsistence lifestyle of rural Alaskans, so the Court should infer that Congress meant to include all navigable waters in Alaska in defining "public lands" in ANILCA. Cross-Pet. 3-7. The Court cannot grant a subsistence priority where Congress failed to clearly state that intent, however, because of the grave implication of the remedy AFN seeks: if ANILCA's subsistence priority applies to fishing in all navigable waters in Alaska, then the Federal Subsistence Board will usurp state regulation of subsistence and some nonsubsistence fishing in these waters. Congress did not clearly state any such intent; AFN's explanation of how Congress included navigable waters is contrived and enigmatic. The Court should not presume that Congress intended this if the statutory language or legislative history does not make it clear,

---

[1] Further, 11 western states disagree with the proposition that the Ninth Circuit's decision has no implications outside Alaska. *See* Briefs of Amici Curiae in support of State's Petition for Writ of Certiorari.

because fisheries management is a traditional state police power that should not be pre-empted without Congressional consideration of its effect on the delicate federal/state balance of functions.

The Supreme Court will interpret a law to affect all activities within Congress' control under its commerce power only if the statutory language or legislative history constitutes a clear statement that Congress intended to exercise this power in full. Laurence H. Tribe, *American Constitutional Law*, § 5-8 at 316 (2d ed. 1988). Federal statutes impinging upon important state interests "cannot . . . be construed without regard to the implications of our dual system of government. . . . " Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 540 (1947) (quoted in part in *BFP v. Resolution Trust Corporation*, ___ U.S. ___, 114 S. Ct. 1757, 1764-65 (1994)). The Court will presume that Congress did not intend to pre-empt areas of traditional state regulation. *Metropolitan Life Insurance Co. v. Massachusetts*, 471 U.S. 724, 740 (1985). Where the field which Congress is said to have pre-empted includes areas that have "been traditionally occupied by the States," Congressional intent to supersede state laws must be "clear and manifest." *English v. General Electric Co.*, 496 U.S. 72, 79 (1990); *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977).

Management of fisheries is an area of traditional state authority. Absent federal legislation on the subject, a state has exclusive power to protect and manage fish and wildlife within its borders. *Carey v. South Dakota*, 250 U.S. 118, 120 (1919). Fisheries management is of the utmost importance to the State of Alaska, as fishing is the State's second largest industry, and securing management

authority was a primary reason Alaskans sought statehood in the 1950's. *See* State's Pet. 13-14.[2]

Congress did not consider pre-emption of state fisheries in passing ANILCA. It chose a definition of "public lands" that includes federally-owned "lands," with certain exceptions, and chose a definition of "lands" that is boilerplate language found in hundreds of statutes in title 16 of the United States Code.[3] Further, the precise scope of "public lands" was immaterial because Congress knew that in anticipation of the pending ANILCA bills, the State had passed a law granting a subsistence priority applicable to ***all*** lands and waters in Alaska in 1978, two years before Congress passed ANILCA. Act of July 12, 1978, Alaska Laws, Ch. 151, *reprinted in Bobby v. Alaska*, 718 F.Supp. 764, 788-91 (D. Alaska 1989); *see* H.Rep. 96-97, Part II, Committee on Merchant Marine and Fisheries, 96th Cong., 1st Sess. at 193 (1979) (section providing for subsistence preference "nearly identical to existing State law"); S. Rep. No. 1300, Committee on Energy and Natural Resources, 95th Cong., 2d Sess. at 220 (1978) (noting that the State had adopted a subsistence provision nearly

---

[2] AFN urges the Court to apply the interpretative maxim that statutes should be construed liberally in favor of Indians. Cross-Pet. 6. This maxim should not be applied so as to eradicate the clear statement requirement for pre-emption of traditional state powers.

[3] ANILCA defines "lands" as "lands, waters, and interests therein," 16 U.S.C. § 3102(1), language that Congress routinely uses in statutes in title 16 establishing conservation areas and parks. *See, e.g.*, 16 U.S.C. §§ 90b, 110c(c)(3), 121, 228b(a), 230a(b), 230g(a), 272(a), 273, 398d, 410j, 410o, 410p, 410bb(b)(1), 410ff-1(a), 410gg, 410gg-1, 410ii-3(a), 410jj-3(c), 410mm-2(b), 410qq-2(a), 410rr-2, 410rr-7(c).

identical to that contemplated by Congress). Congress contemplated that the State would implement the subsistence priority everywhere in Alaska, therefore, and thus necessarily would manage all fisheries.[4] As a result, Congress did not debate the meaning of its definition of "public lands," and did not consider displacing state management of fisheries. AFN does not even suggest that Congress thought that the navigational servitude was a property interest of the United States or that it thought "public lands" included the navigational servitude.[5]

III. THE NAVIGATIONAL SERVITUDE IS THE PARAMOUNT AUTHORITY OF THE UNITED STATES OVER NAVIGATION AND DOES NOT CONSTITUTE A PROPERTY INTEREST.

The argument that all navigable waters in Alaska are "public lands" under ANILCA is premised on the proposition that the navigational servitude is a property interest to which the United States has "title." The navigational servitude is not a property interest but is the

---

[4] Congress never foresaw that in 1989 the Alaska Supreme Court would issue the decision that would prompt federal management on "public lands." *See McDowell v. State*, 785 P.2d 1 (Alaska 1989); State's Pet. 4.

[5] The statement that Rep. Udall submitted to the Congressional Record does not reflect the intent of Congress, because both houses passed ANILCA before any member of Congress could have read the statement. *See State v. Babbitt*, 72 F.3d 698, 703 (9th Cir. 1995) (Udall's views deserve little weight, because he inserted the statement after the Senate passed ANILCA, after the House had finished debating it, and shortly before the House voted on it).

authority of the United States to regulate in furtherance of navigation. It refers to the government's dominion over navigable waters, *United States v. Twin City Power Co.*, 350 U.S. 222, 228 (1956), for the purpose of keeping them open for use by the public as "continuous highways for the purpose of navigation in interstate commerce," *Kaiser Aetna v. United States*, 444 U.S. 164, 178 (1979). It derives from the Commerce Clause, which "speaks in terms of power, not of property." *Twin City Power Co.*, 350 U.S. at 224.

AFN argues that the United States holds "title to an interest" in all navigable waters in Alaska because it is not required to compensate riparian property owners when it exercises the navigational servitude. It argues also that the Ninth Circuit's rejection of this argument is inconsistent with a previous decision of this Court, *Amoco Production Co. v. Village of Gambell*, 480 U.S. 531 (1987). The navigational servitude does not give the United States title to an interest in the property of a riparian owner, however, but is merely the exercise of governmental authority to regulate land use, which does not constitute a taking in any context when a property owner takes title with the restriction in place. Further, this Court's previous dictum about the nature of the United States' interest in the outer continental shelf does not support the argument that the United States has title to the navigational servitude.

A. THE AUTHORITY OF THE UNITED STATES TO REGULATE LAND USES DOES NOT GIVE IT TITLE TO AN INTEREST IN THE AFFECTED PROPERTY.

AFN argues that the United States must hold title to the navigational servitude because it is not required to compensate riparian property owners when the government uses or diminishes the value of the property in furtherance of navigation or commerce. Cross-Pet. 14. It also points to language in Supreme Court decisions describing the navigational servitude as a "dominant servitude" or an "easement." *Id.*

A government does not have a property interest in lands or waters simply by virtue of its authority to restrict or prohibit certain uses without compensation. Laws in existence when a property owner obtains land define the owner's interest in the property. Because laws restricting the owner's use of the land limit the rights he gets as owner, he suffers no loss when the government enforces those restrictions. In *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1030 (1992), this Court explained that the Takings Clause does not require compensation when an owner is barred from putting land to a use that is proscribed by "existing rules or understandings that stem from an independent source such as state law [that] define the range of interests that qualify for protection as 'property' under the Fifth (and Fourteenth) amendments." Such rules also may stem from federal law. *See id.* at 1029. The Court cited this principle as an exception to the Fifth Amendment compensation requirement for both physical takings and for regulatory takings. *Id.*

Thus, governmental action based on the authority to regulate navigable waters for commerce and navigation do not effect takings of the property interests of a riparian land owner because the owner obtained the property interest subject to this authority.

The fact that a property owner gets less than a "full bundle of sticks" because the government has existing authority to restrict land use does not mean that the government holds title to an interest in the land in any conventional sense of property law. A government's authority to limit land use for the public good is a sovereign rather than a proprietary function. To the extent that existing restrictions limit a property owner's use of land, the government does not have a corresponding property interest that it can sell, transfer, or otherwise convey. Property rights are determined by law, and laws restricting land use simply change the number of sticks that constitute a "full bundle" in holding fee title to the affected property.

For example, an Office of Surface Mining Reclamation and Enforcement's cessation order that prevented mining did not effect a taking, because the company's "bundle of rights" in the property did not include an interest in weakening the surface of the land so as to threaten the public. *M & J Coal Company v. United States*, 47 F.3d 1148, 1154 (Fed. Cir.), *cert. denied*, 116 S.Ct. 53 (1995). Similarly, the owner of a wetland who obtained it after Congress passed the Clean Water Act did not suffer a loss by the Environmental Protection Agency's denial of a permit under § 404(c) of that act. *See Ciampitti v. United*

States, 22 Cl.Ct. 310, 321-22 (1991) (landowner who purchased wetland with knowledge of the regulatory structure and with warning that the requisite permit was "virtually impossible to get" had no reasonable investment-backed expectations). The owner of a savings and loan association did not suffer a taking when the Resolution Trust Corporation seized the property, because the owner "did not possess the most valued property right in the bundle of property rights, the right to . . . exclude others." *California Housing Securities, Inc. v. United States*, 959 F.2d 955, 958 (Fed. Cir.), *cert. denied*, 506 U.S. 916 (1992); *see also 767 Third Avenue Associates v. United States*, 48 F.3d 1575 (Fed. Cir. 1995) (as member of the public, lessor of office space to foreign government was on notice that the United States government could close a foreign government's offices and freeze its assets, and thus had no expectation of no governmental interference). Under AFN's theory, the United States would hold "title to an interest" in all the property subject to regulation in these cases.

Further, the description of the navigational servitude in case law as a "servitude" or an "easement" does not indicate that the United States has title to it. Any preexisting restriction on land use could be analogized to an easement; the Environmental Protection Agency's authority to deny a § 404 permit under the Clean Water Act could be characterized as a conservation easement or a restrictive covenant on wetlands to which the authority attaches, for example. 33 U.S.C. § 1344(c) (1986). These interests simply describe a granted right to limit uses of land. In the context of private persons or entities, they constitute property interests that are proprietary and

transferable, but when legislated or promulgated by the government they constitute the exercise of sovereign regulatory authority.

Congress itself has defined the navigational servitude as regulatory authority rather than a property interest. In the Submerged Lands Act, 43 U.S.C. §§ 1301-1315 (1986), Congress defined the navigational servitude expressly to exclude any ownership rights. In confirming in and granting to states title to certain submerged lands, the United States retained:

> all its navigational servitude and rights in and powers of regulation and control of said lands and navigable waters for the constitutional purposes of commerce, navigation, national defense, and international affairs, all of **which shall be paramount to, but shall not be deemed to include, proprietary rights of ownership**. . . .

43 U.S.C. § 1314 (emphasis added).

Equating the regulatory authority of the United States to a property interest in non-federal lands and waters to render them "public lands" is the complete antithesis of finding a clear and manifest statement of Congressional intent to assume management of Alaska's fisheries. AFN vigorously promotes this theory without offering any evidence that Congress thought it was including all lands and waters subject to its authority to restrict uses. Had Congress meant to pre-empt state management of fish and wildlife to this extent, surely it would have found a clearer way to express that intent than by referring to federal "title to interests in lands and waters" and assuming that this would be understood to include all lands and waters subject to its regulatory

authority. It would have defined "public lands" simply as all lands and waters in Alaska.

B. THE NINTH CIRCUIT'S REJECTION OF THE ARGUMENT THAT THE UNITED STATES HOLDS TITLE TO THE NAVIGATIONAL SERVITUDE IS CONSISTENT WITH THIS COURT'S PRECEDENT.

AFN's argument that the Ninth Circuit decision conflicts with *Amoco v. Village of Gambell* greatly overstates the significance of one sentence in a footnote in that case. 480 U.S. at 548 n.15. The sentence was dictum and does not support its interpretation of the definition of "public lands."

Gambell raised the issue of whether the outer continental shelf ("OCS") constitutes "public lands" under ANILCA § 102. This Court found that the OCS does not qualify as "public lands" under ANILCA because it is outside the boundary of Alaska. *Id.* at 547. In dictum, the Court stated also that while the United States may not hold title to the submerged lands of the OCS, it hesitated to conclude that the United States did not hold title to any interests therein. *Id.* at 548 n.15.

To conclude from this dictum that the Court believes that Congress intended the existence of any federal interest in any lands or waters to convert them to "public lands" is an extraordinarily broad reading of the footnote. The Court's hesitation to conclude that the United States does not hold any interest in lands over which it has "paramount rights," *United States v. California*, 332 U.S. 19, 36 (1947), does not imply that any federal interest in

lands or waters would convert them to "public lands" if they were in Alaska. Furthermore, even if the Court had found that Congress intended the OCS to be "public lands" under ANILCA, the United States' interest in the OCS is quite different than its interest in all navigable waters. While the United States does not hold title to the OCS in the conventional sense, it has paramount national power over it, and has a property interest in the oil and gas there, which it leases to private entities. *United States v. Maine*, 420 U.S. 515, 524-25, 527-28 (1975). Congress has declared the OCS to be an area appurtenant to the United States, subject to its jurisdiction, control, and power of disposition. Outer Continental Shelf Lands Act, 43 U.S.C. §§ 1331-1356, 1332(1) (1986).

It was unextraordinary, therefore, that the Court hesitated to find that the United States did not hold title to any interest in the OCS. This statement cannot be understood to mean that the existence of the navigational servitude converts all navigable waters in Alaska to "public lands." In making this statement in *Gambell*, the Court did not examine the clear statement doctrine to determine whether Congress clearly intended to assume a traditional state function; it did not consider whether the authority to regulate land gives the United States "title" to an interest in property; and it did not consider whether the navigational servitude constitutes property of the United States. The Court's statement should be understood in relation to the issue before it.

AFN also overstates the meaning of the Court's statement that "public lands" must be understood in context. Cross-Pet. 8-10. This Court never has suggested that in interpreting "public lands," a court should consider the

universe of factors suggested by AFN. As "context" for Congress' intent in drafting a definitional provision that it hardly discussed, AFN suggests that the Court consider a 1955 Supreme Court decision, the Alaska Statehood Act, the Alaska Native Claims Settlement Act, and the Secretary of Interior's land freeze in 1969. Cross-Pet. 9-10. In fact, the Court simply stated in *Amoco* that it rejected the assertion that the phrase "public lands," in and of itself, has a precise meaning *"without reference to a definitional section or its context in a statute."* 480 U.S. 531, 549 n.15 (emphasis added).

In ANILCA, Congress expressly defined "public lands," so the Court need not examine the history of federal law in Alaska to determine its meaning; the Court should consider Congress' given definition. To the extent that the definition is ambiguous, the Court cannot infer that Congress must have meant to include navigable waters because Congress has not demonstrated a "clear and manifest" intent to pre-empt state fisheries management in all state waters. *See supra* at 3.

CONCLUSION

For the reasons stated above, the Court should deny the cross-petition for Writ of Certiorari.

DATED this 12th day of April, 1996.

Respectfully submitted,

BRUCE M. BOTELHO
Attorney General

JOANNE M. GRACE
Assistant Attorney General
1031 W. 4th Avenue, Suite 200
Anchorage, Alaska 99501
(907) 269-5100
Counsel for Cross-Respondent